Biewer Wisconsin Sawmill, Inc. *and* Midwestern Industrial Council—United Brotherhood of Carpenters and Joiners of America, AFL–CIO. Case 18–CA–12001

March 19, 1992

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND OVIATT

On December 26, 1991, the General Counsel of the National Labor Relations Board issued a complaint and notice of hearing alleging that the Respondent has violated Section 8(a)(1) and (5) of the National Labor Relations Act by refusing the Union's request to bargain following the Union's certification in Case 18–RC–15063. (Official notice is taken of the ''record'' in the representation proceeding as defined in the Board's Rules and Regulations, Secs. 102.68 and 102.69(g); *Frontier Hotel*, 265 NLRB 343 (1982).) The Respondent filed its answer admitting in part and denying in part the allegations in the complaint.

On January 30, 1992, the General Counsel filed a Motion for Summary Judgment. On February 6, 1992, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed a reply to the Motion for Summary Judgment and an application for issuance of subpoena duces tecum.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Summary Judgment

In its answer the Respondent ''neither admits nor denies'' that the Union was a labor organization within the meaning of Section 2(5) of the Act.[1] Although Respondent admits that on October 4, 1991, the Board issued a Decision and Certification of Representative certifying the Union as the exclusive collective-bargaining representative of its employees,[2] Respondent nevertheless denies that a secret-ballot election was conducted on August 30, 1991, and that a tally of ballots was issued ''for the reason that the election was not valid because the Union committed material unfair election practices which are sufficient to set aside the election and the results and to order a new election.''[3]

In its answer the Respondent ''neither admits nor denies'' the complaint allegation that the Union has requested bargaining. Counsel for the General Counsel attached to his Motion for Summary Judgment two letters to the Respondent from the Union dated October 13 and November 19, 1991. These letters constitute requests to bargain.[4] Respondent does not dispute the receipt or authenticity of these letters in its reply to the Motion for Summary Judgment. Accordingly, we find that the Union has requested bargaining with the Respondent.

In its answer the Respondent denies its refusal to recognize and bargain with the Union. However, by letter of December 16, 1991, the Respondent informed the Regional Director that it intended to test the Union's certification in this unfair labor practice proceeding. Counsel for the General Counsel attached this letter to his Motion for Summary Judgment and Respondent does not dispute its authenticity in its response to the Motion for Summary Judgment. Based on this admission, we find that the Respondent has failed and refused to recognize and bargain with the Union.

Respondent attacks the validity of the certification of the Union on the basis of its objections to the election. However, as we have previously found in the underlying proceeding, these objections were not timely filed pursuant to the Board's Rules and Regulations, Section 102.69.[5]

All representation issues raised by the Respondent were or could have been litigated in the prior representation proceeding. The Respondent does not offer to adduce at a hearing any newly discovered or pre-

[1] By entering into a Stipulated Election Agreement in the underlying representation proceeding, the Respondent agreed that the Union was a labor organization. At no time during the underlying representation proceeding did the Respondent raise a question concerning the Union's status as a 2(5) labor organization. Its failure to raise this issue in the underlying representation proceeding precludes the Respondent from litigating the matter in this proceeding. *Wickes Furniture*, 261 NLRB 1062, 1063 fn. 4 (1982).

[2] In response to the complaint allegation that the Union was certified as the exclusive bargaining representative of the employees in the bargaining unit, the Respondent ''contends that the Union should not have been certified as the exclusive bargaining representative for the proposed unit.'' This response does not deny the certification which, in any event, is clearly shown in the underlying proceedings.

[3] Because the record in the underlying representation proceeding clearly shows that the election was conducted and a tally of ballots issued and because the Respondent admits the issuance of the Decision and Certification of Representative, its denial of the conduct of the election and issuance of the tally of ballots is without merit.

[4] The October 13, 1991 letter requests information from the Respondent. This constitutes a request to bargain. *Pak-Well*, 206 NLRB 260, 261 (1973); *Rod-Ric Corp*., 171 NLRB 922, 923–924 (1968), enfd. 428 F.2d 948 (5th Cir. 1970). The November 19, 1991 letter requests that Respondent call it ''to set a date to begin negotiations.'' This clearly indicates a desire to negotiate. See *Al Landers Dump Truck*, 192 NLRB 207, 208 (1971) (''valid request to bargain need not be made in any particular form, or in haec verba, so long as the request clearly indicates a desire to negotiate'').

[5] In its answer, Respondent denies that its objections were untimely filed. As we noted in the underlying representation proceedings, the election was conducted and a tally of ballots issued on August 30, 1991. Sec. 102.69(a) of the Board's Rules allows 7 calendar days for the filing of objections to conduct affecting election. In this case, the correct date would have been no later than September 6, 1991. The Respondent's objections were dated and mailed on September 10, 1991, and received in the Regional Office on September 11, 1991. The objections were clearly out of time under the applicable rule.

viously unavailable evidence,[6] nor does it allege any special circumstances that would require the Board to reexamine the decision made in the representation proceeding. We therefore find that the Respondent has not raised any representation issue that is properly litigable in this unfair labor practice proceeding. See *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941). Accordingly, we grant the Motion for Summary Judgment.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, Biewer Wisconsin Sawmill, Inc., a Michigan corporation with an office and place of business in Prentice, Wisconsin, is engaged in the operation of a lumber mill and the milling of lumber. During the 12-month period ending December 31, 1991, Respondent purchased and received at its Prentice, Wisconsin facility goods valued in excess of $50,000 directly from points outside the State of Wisconsin. We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *The Certification*

Following the election held August 30, 1991, pursuant to a Decision and Certification of Representative, the Union was certified on October 4, 1991, as the collective-bargaining representative of the employees in the following appropriate unit:

> All full-time and regular part-time production employees, maintenance employees, boiler operators, helpers and machine operators employed by the Employer at its facilities located in Prentice, Wisconsin; but excluding all office clerical employees, salespersons, professional employees, guards and supervisors as defined in the Act.

The Union continues to be the exclusive representative under Section 9(a) of the Act.

B. *Refusal to Bargain*

Since on or about October 13, 1991, and on November 19, 1991, the Union has requested the Respondent to bargain and, since on or about October 13, 1991, the Respondent has refused. We find that this refusal constitutes an unlawful refusal to bargain in violation of Section 8(a)(1) and (5) of the Act.

CONCLUSION OF LAW

By refusing on and after October 13, 1991, to bargain with the Union as the exclusive collective-bargaining representative of employees in the appropriate unit, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (5) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has violated Section 8(a)(1) and (5) of the Act, we shall order it to cease and desist, to bargain on request with the Union, and, if an understanding is reached, to embody the understanding in a signed agreement.

To ensure that the employees are accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of the certification as beginning the date the Respondent begins to bargain in good faith with the Union. *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962); *Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817 (1964); *Burnett Construction Co.*, 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir. 1965).

ORDER

The National Labor Relations Board orders that the Respondent, Biewer Wisconsin Sawmill, Inc., Prentice, Wisconsin, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain with Midwestern Industrial Council—United Brotherhood of Carpenters and Joiners of America, AFL–CIO as the exclusive bargaining representative of the employees in the bargaining unit.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit on terms and conditions of employ-

[6] In Respondent's application for issuance of subpoena duces tecum, the Respondent requests that the Board serve a subpoena which the Respondent previously obtained from the Regional Director. The Board does not serve subpoenas which have been issued to parties. Rather, the party must serve the subpoena pursuant to Rule 102.111(a). Accordingly, the Respondent's application is denied. Moreover, we note that even were the Respondent's newly appointed counsel to obtain the requested affidavits and statements taken by prior counsel, it would not be newly discovered or previously unavailable evidence as to the Respondent. The Respondent concedes that the documents it seeks in the subpoena ''constitute the only viable basis upon which [it] can demonstrate the existence of newly discovered or previously unavailable evidence.'' (Reply at 1.) Inasmuch as we are denying the Respondent's request that we serve the subpoena and Respondent concedes it has nothing else, no purpose is served in further delaying these proceedings.

ment and, if an understanding is reached, embody the understanding in a signed agreement:

> All full-time and regular part-time production employees, maintenance employees, boiler operators, helpers and machine operators employed by the Employer at its facilities located in Prentice, Wisconsin; but excluding all office clerical employees, salespersons, professional employees, guards and supervisors as defined in the Act.

(b) Post at its facility in Prentice, Wisconsin, copies of the attached notice marked ''Appendix.''[7] Copies of the notice, on forms provided by the Regional Director for Region 18 after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[7] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain with Midwestern Industrial Council—United Brotherhood of Carpenters and Joiners of America, AFL–CIO as the exclusive representative of the employees in the bargaining unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the bargaining unit:

> All full-time and regular part-time production employees, maintenance employees, boiler operators, helpers and machine operators employed by the Employer at its facilities located in Prentice, Wisconsin; but excluding all office clerical employees, salespersons, professional employees, guards and supervisors as defined in the Act.

BIEWER WISCONSIN SAWMILL, INC.